FILED
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-361

EUGENE T. SCOTT,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee, entered in this case on July 1, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether a State criminal conviction achieved in clear disregard to well-established state law and totally devoid of evidentiary support is invalid under the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends the Writ should be granted as it presents an issue important to the criminal process concerning state violations of the due process clause of the Fourteenth Amendment.

II. Petitioner has not received needed and proper relief by the Courts below.

STATEMENT OF THE CASE

The Shelby County Grand Jury indicted defendant, Eugene T. Scott, and Robert B. Scales for murder in the first degree. The indictment was returned on July 7, 1971. Defendant was originally represented by private counsel, Sam Catanzaro and Gary L. Pagels, of the Memphis and Shelby County Bar. Both defendants initially were tried on October 17, 1972, but a mistrial was declared the following day.

On March 19, 1973 the Trial Court granted a severance and defendant Scott was tried alone.

At the second trial defendant was represented by Gary London Pagels. The trial began on March 20, 1973, and on March 22, 1973 the defendant was found guilty by the jury of murder in the first degree. He was sentenced to thirty-three years confinement in the State Penitentiary.

Defendant filed his Motion for a New Trial on April 18, 1973 which was heard and overruled on May 25, 1973.

After an appropriate order extending the time for the filing of the Bill of Exceptions, the Bill of Exceptions was filed on August 17, 1973. The Court of Criminal Appeals on April 3, 1974 affirmed the decision of the lower court. Certiorari was denied by the Tennessee Supreme Court on July 1, 1974.

STATEMENT OF THE FACTS

Melvin Reed, a barber, was shot and killed at about 9:00 p.m. on Friday, January 22, 1971. He was shot by Robert B. Scales. The events, as shown from the State's proof, which led up to this homicide are in conflict, Scales giving a different version of how he shot Melvin Reed from that of the deceased's companion, Major Reed.

Major Reed, a cousin of the deceased, testified that he went to Melvin Reed's barber shop at Perry and Elliston Road at about 8:00 p.m. on January 22, 1971, and had his hair cut. He waited for the deceased to close the barber shop and the two left in Major Reed's car with Major Reed driving. They drove to a service station, purchased gas, and intended to return to the barber shop. En route an automobile approached and began blinking its lights. After he turned off the road on which he had been driving onto Perry Road, the same car came beside Major Reed and almost rammed his automobile. After a similar act, someone in the car said to pull over. The deceased also advised Major Reed to pull over. The car stopped at 2333 Perry Road. Major Reed was driving a Cadillac. The other car, a white and blue Buick Skylark, stopped in front of the Cadillac. The deceased said that one of the two in the car was Robert B. Scales. Scales got out of the Buick and the deceased got out of the Cadillac. Scales had a pistol which could be seen by Major Reed. The deceased and Scales talked for a moment and Scales said, "Hold it. Don't put your hands in your pocket." "Then they started firing." Scales fired four to six times at the deceased. Major Reed got under his car, the Cadillac. There is no testimony from Major Reed that the other occupant, the driver of the blue and white Buick Skylark, ever exited the car. Major Reed could not identify the driver of the Skylark. After the shooting

the Skylark drove off fast and Major Reed ran across the street and asked two women to call the police. He put a pillow under the deceased's head and held an umbrella over him. He waited for an ambulance to arrive and examined the contents of the pockets of the deceased to see if he had any identification. He found two packages of what appeared to him to be marijuana. The deceased was taken to John Gaston Hospital where he died.

Major Reed returned to the barber shop where he saw a William Gandy and George Powell. He picked up a Tommy Smith at a service station and went with Smith to John Gaston Hospital.

Robert B. Scales, the admitted killer's story of the incident is somewhat different. At the time of the trial Scales was still under the indictment for the murder of Melvin Reed, however, he testified for the State. Scales is presently confined in the Atlanta Federal Penitentiary for the manufacture and sale of marijuana and for a parole violation. He was serving twenty-one (21) years, and was confined in the penitentiary at the time of trial. Scales had a prior record for the possession and sale of marijuana.

Scales testified that on Friday, January 22, 1971 (the day of the homicide), that he picked up the defendant at Sam Sims' house. At this time the defendant was driving a blue '64 or '65 Buick convertible. He had known Scott since 1966. The two went to Melvin Reed's (the deceased) house to collect $100.00 owed Scales by Reed. They were unable to find him there. Scales testified that they saw the deceased in the Cadillac driven by Major Reed and Scott blinked his lights at them. At this time the defendant had a pistol under the passenger seat which he allowed Scales to use. The defendant was armed with a pistol in a shoulder holster. Scales said that they pulled

the Cadillac over on Perry Street and that Scott got out with his pistol in his hand. He stated that he also got out but that his pistol was in his jacket. He talked to the deceased and asked him why he had not brought him any money. He said that Scott was supposed to cover Major Reed because that was what people with whom he was were supposed to do. There was no testimony, however, that Scott knew this.

Scales testified that the deceased made a "break" to get a small razor and that Major Reed got out of the car. Scales knocked Major Reed down and the deceased "went to come up on me with his - - - with this little thing in his hand and I started tripping the trigger on the gun and I shot him." Scales fired five times. Scales testified that he pulled the trigger on the pistol on Major Reed and that it did not go off. He kicked him in the side and left. (Reed had previously testified that he was under his own Cadillac automobile and made no mention of being kicked during this time.)

After the shooting Scales and the defendant went to the home of the defendant's girl friend, John Ella Hollis, at 500 Walker Avenue. He said defendant took the two pistols to her house. Scales further testified that defendant later told him that he and Frances Montgomery (the girl friend of Scales) threw the pistols in the river.

Scales testified that Frances Montgomery (his woman) had been going with the defendant before Scales was arrested on the Federal marijuana charge. Scales read several letters which he had written to various people and testified in a bizarre, incoherent and irrelevant manner. For example, he referred to the number 21 on the letter as being 21 years which he had gotten in the Federal case divided by 3, which was the number of people he

was to split it with equals 7, for which he gave some other ridiculous explanation. Whether the number 21 ever appeared on any of the letters is unknown as there are no exhibits attached to this record.

Major Reed went to police headquarters and identified a picture of Scales as the person who had killed Melvin Reed from a series of mug shots. He later identified Scales in person at the police department.

Major Reed in a second statement to the police told them that the automobile was either a Buick or a Pontiac, and on another occasion that it was either a Buick or an Oldsmobile.

A representative of the County Court Clerk's Office testified that defendant owned a 1964 Buick convertible which had originally been registered to him on October 26, 1970.

E. C. Myles who operated Myles Body Shop testified that he painted the defendant's blue and white 1964 Skylark in November of 1970. At this time he re-painted the already blue car blue. A black top was put on the convertible by King's Upholstery in November of 1970, at the time in which he first painted it. Myles testified that the defendant brought the car back to him sometime in January of 1971 and asked that it be painted gray and that this second paint job could have been before the date of the homicide. The car had faded blue spots on it when he painted it the second time.

In March of 1971, the police contacted Major Reed and took him to Coleman's School in Raleigh, Tennessee, to see if he could identify the Buick Skylark.

Major Reed did identify the car as the car which had pulled in front of them on the night Melvin Reed

was killed. He rubbed off a portion of the paint and found it to be blue underneath, even though the car had now been painted gray.

Samples of the paint of the defendant's car were sent to the F.B.I. Laboratory in Washington, D. C. where an expert from there testified that the car had two primer coats, then a factory blue color and then repainted blue and later repainted gray.

R. R. Davis of the Memphis Police Department interviewed Scott on January 26, 1971. He did not arrest Scott at this time, but took a written statement from him in which the defendant admitted knowing Scales but denied being involved or participating in any way in the shooting. The defendant stated that his sister owned a 1969 *Pontiac* automobile which was gray over black and which did not have mag wheels. He further stated that he owned no car and gave an account of his whereabouts on the date of the killing.

On March 12, 1971, Detective Davis saw a 1969 gray Skylark parked at 350-C Thomas. It belonged to the defendant's sister, Mildred Thomas. The defendant, at the officer's request, again went to police headquarters where he gave a second statement. The defendant was not placed under arrest. In the second statement defendant said that he drove Scales to a Walter Powell's house the day after the killing (January 23, 1971). Defendant said that he did not own a blue and white Buick Skylark and that his car had been stolen.

Detective Davis found a 1964 gray Buick Skylark parked at Coleman Elementary School in Raleigh. It was newly painted and had a new black top. He checked and found it to be registered to T. E. Scott of 331 Simpson. At this time four new tires and mag wheels with

no hubcaps were on the automobile. The police department had been looking for a car of this description with mag wheels. He checked inside and found the car was being used by the defendant's sister. She told them that it was her brother's car. It was this car that Major Reed identified as the car with which they had had contact on the night of the killing.

On March 24, 1971, Detective Davis again contacted defendant and took a third statement. Still no arrest was made. In the third statement the defendant said that the police had been mistaken and that he did not tell them that he did not own a car but that he didn't own it even though it was registered in his name because he had bought it for his sister, Mildred. He stated that it had been painted gray in November and a new black top put on it at that time. It had previously been white over blue. He and his sister had swapped cars.

On July 7, 1971, the defendant was indicted, not in custody, and arrested. At the time of his arrest a fourth statement was taken, his automobile searched and a box of .357 magnum pistol shells were found in the trunk. At this time mag wheels were on the car and regular wheels found in the trunk. In the fourth statement defendant again denied any knowledge of the homicide and stated that the .357 magnum shells found in the car were not his and that several people used his automobile. Charles Birt and Jewel Ayers both saw the shooting from their houses near the scene but neither could identify anyone.

James S. Bell, M.D., Deputy Medical Examiner and a pathologist, testified that the defendant died from multiple gun shot wounds.

ARGUMENT

I.

The State of Tennessee Denied the Petitioner Due Process As Guaranteed by the Fourteenth Amendment by Convicting Him Without Evidentiary Support.

A. Under Tennessee law, the uncorroborated testimony of an admitted accomplice, standing alone, is incapable of sustaining a criminal conviction.

It is well-settled law in Tennessee that the testimony of an admitted accomplice must be corroborated in order to sustain a criminal conviction. *Hicks* v. *State,* 126 Tenn. 359, 149 SW 1055 (1912); *Monts* v. *State,* 214 Tenn. 171, 379 SW2d 34 (1964). As the Court stated in *Boulton* v. *State,* ..... Tenn. ....., 377 SW2d 936 (1964):

> "The rule is that, to sufficiently corroborate the testimony of the accomplice, there should be some fact testified to, entirely independent of the accomplice's evidence, which, taken by itself, leads to the inference not only that a crime has been committed, but also that the defendant is implicated in it."

The State's proof showed that Robert B. Scales killed the deceased; Scales himself testified that he was the person who had pulled the trigger which resulted in the fatal shots. Furthermore, at the time of the trial, Scales was under indictment for this offense and was incarcerated in the Federal Penitentiary in Atlanta, Georgia. Under the facts as stated above, therefore, there can be no doubt as to Scales being an accomplice in this incident.

Importantly, since Scales was the only person who actually placed the petitioner at the scene of the murder as the operator of the automobile, his testimony must be corroborated.

The only evidence independent of the testimony of accomplice Scales that the defendant had anything at all to do with the killing came from Marvin Reed and did not directly support Scales to any extent. His testimony established only that:

(1) petitioner misinformed police about his ownership of a 1964 Buick Skylark convertible automobile, and

(2) the petitioner at some time, either shortly before or after the death of the deceased, had his automobile repainted.

These two facts standing alone do not fairly and independently of the testimony of the accomplice show, or tend to show, that he was a party to the murder of Melvin Reed. There is, furthermore, no evidence that the petitioner was a principal and ready, willing and able to abet in the commission of the crime. The Court in *Moore v. State,* 1 Tenn. Crim. 190, 432 SW2d 684 (1968), defined an accomplice as one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of the crime. Mere presence, alone, at the scene of the crime does not make one a principal. Looking at the State's testimony in the most favorable light, the petitioner and Scales went to collect a debt the deceased owed Scales in petitioner's car. They stopped the automobile of the deceased and the deceased and Scales got out. There is, however, no testimony that the petitioner ever removed himself from the automobile. There is nothing further from which to infer that he was a lookout, that the murder had been planned, that there was

any conspiracy between the two to kill, rob, or do anything other than collect a debt the deceased owed accomplice Scales. Clearly, there was no evidence contained in the record from which it could be concluded that the petitioner was ready, willing, and able to aid and abet in the commission of the crime.

There is an additional reason to reject the evidence of the accomplice Scales since it is totally inconsistent with the testimony of the deceased's companion of the evening in question, Major Reed. The companion testified that he got out of the automobile and under it. The accomplice Scales, however, testified that he knocked the man down, kicked him in the face, pulled his pistol and pointed it at him, pulled the trigger, but the pistol did not fire. Had this been so, certainly Major Reed would have said so. Reed further contradicted the accomplice Scales when he testified that the petitioner never removed himself from the automobile, nor that the petitioner was armed. Reed simply stated that he could not identify the petitioner because the petitioner remained in the automobile. For his part, the petitioner consistently, after having been questioned by the police on four (4) separate occasions, denied his guilt and participation in this crime.

B. A conviction devoid of evidentiary support is invalid under the Due Process Clause of the Fourteenth Amendment.

In reversing and remanding a conviction in a City Police Court for "loitering" and "disorderly conduct," this Supreme Court held that it was a violation of due process to convict and punish a man without evidence of his guilt. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). This rule has been consistently upheld since then. *See e.g., Gregory* v. *Chicago*, 394 U.S. 111 (1969). As the record

clearly indicates in the instant case, petitioner was convicted and subsequently sentenced without any evidentiary support.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAN GARFINKLE
Attorney for Petitioner

WILLIAM C. WILSON
Of Counsel

CERTIFICATE OF SERVICE

We hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been forwarded to the Honorable R. A. Ashley, Jr., Tennessee State Attorney General, Supreme Court Building, Nashville, Tennessee 37219 this 27th day of September, 1974.

DAN GARFINKLE
Attorney for Petitioner

WILLIAM C. WILSON
Of Counsel

APPENDIX

IN THE
COURT OF CRIMINAL
APPEALS OF TENNESSEE

JACKSON, NOVEMBER, 1973

No. 22

Shelby County

Hon. W. Otis Higgs, Judge

(First Degree Murder)

EUGENE T. SCOTT,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

For the Plaintiff-in-Error:

Trial:

Gary L. Pagels
Memphis, Tennessee

Appeal:

Hugh Stanton, Jr.
Memphis, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Weldon B. White, Jr.
Assistant Attorney General

Jesse Clyde Mason and
Joseph L. Patterson
Assistant District Attorneys General

Opinion Filed: April 3, 1974

AFFIRMED

William S. Russell,
Judge

OPINION

Eugene T. Scott, represented by the Public Defender, appeals his first degree murder conviction and sentence of thirty-three (33) years in the penitentiary.

On January 22, 1971, the homicide victim, Melvin Reed, was riding in an automobile with his cousin, Major Reed, when they were told to pull over. One Robert Scales was in the blue and white Buick Skylark from which the order came; and after both vehicles had stopped unquestionably Scales shot Melvin Reed to death. Major Reed identified Scales, but could not identify the plaintiff-in-error, Eugene T. Scott. He did say that another man was with Scales, and he subsequently identified an automobile shown by other proof to belong to plaintiff-in-error to have been the car whose occupants caused them to stop. Scales, the actual killer, testified for the State and unequivocally named Eugene T. Scott as his accomplice.

The fact that the most of the State's evidence against Scott came from the testimony of Scales, who claimed Scott as his accomplice, presents the only close question in this case. However, we find the necessary corroboration of the accomplice's testimony from the fact that

Scott's car was otherwise proven to have been the one used, that he had lied about owning such a car, and there was evidence that he had the car painted to change its appearance after the crime. We overrule all assignments of error questioning the legal sufficiency of the convicting evidence.

The contention that the verdict [punishment] is so excessive as to indicate passion and caprice and should therefore be set aside is without merit because the punishment fixed is within the range prescribed for the crime. *Carroll* v. *State*, 212 Tenn. 464, 370 S.W.2d 523.

Three assignments of error have to do with the fact that evidence was introduced that marijuana was found upon the person of the murder victim. It is said (1) that this resulted in excessive punishment (being actually punishment for another crime than the one being tried upon), (2) that this evidence was prejudicial and (3) the court should have instructed the jury to disregard this testimony because it was insufficient to establish motive and was completely irrelevant.

The testimony of Scales, the triggerman, was that he and the defendant were partners selling marijuana, and that they stopped the deceased to collect money that the deceased owed them. The marijuana tended to corroborate the State's theory of motive, and was a part of the physical evidence in the case. The fact that it may have been prejudicial did not render it inadmissible, as all effective evidence is prejudicial to the one against whom it is directed.

Finally, it is said that the Court erred in permitting the State to question one of its witnesses, Detective Davis, as to certain ammunition found in the defendant's automobile. This assignment is "not waived, but hereby sub-

mitted to the Court", without being briefed. We hold that the assignment is without merit.

Affirmed.

/s/ William S. Russell, Judge

Concur:

/s/ Robert K. Dwyer, Judge

/s/ Charles H. O'Brien, Judge

IN THE
SUPREME COURT OF TENNESSEE
AT JACKSON
SHELBY CRIMINAL

No. 22

(#B-31630)

EUGENE T. SCOTT

VS.

STATE OF TENNESSEE

This cause came on to be heard upon a petition for certiorari and reply thereto, and after full consideration by the Court, the Court is of the opinion that there is no merit in said petition, and the same is accordingly denied at the cost of the petitioner, for which let execution issue. 7-1-74.

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THE STATE OF TENNESSEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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10-28-74-46

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

MAY IT PLEASE THE COURT:

On March 22, 1973, the petitioner, Eugene T. Scott, was found guilty of murder in the first degree and was sentenced to thirty-three (33) years confinement in the State Penitentiary. On April 3, 1974, the judgment of the Trial Court was affirmed by the Court of Criminal Appeals of Tennessee. On July 1, 1974, the Supreme Court of Tennessee denied his Petition for a Writ of Certiorari. *Scott v. State*, ____S.W.2d____ (Tenn. Cr. App. 1974).

QUESTION PRESENTED FOR REVIEW

Whether the charge against petitioner was so totally devoid of evidentiary support as to render the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

The charge against petitioner is not so totally devoid of evidentiary support as to render the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. In *Thompson v. City of Louisville*, 362 U.S. 199 (1960) this Court held that a conviction unsupported by any evidence at all was in violation of the Due Process Clause of the Fourteenth Amendment. Whether a conviction is unconstitutional under the Due Process Clause of the Fourteenth Amendment depends upon whether the conviction rests upon any evidence at all rather than upon the sufficiency of the evidence. In view of the facts of this case, the respondent insists that the charge against the petitioner is not totally devoid of evidentiary support so as to render the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment.

The petitioner also contends that he was convicted upon the uncorroborated testimony of an accomplice, Robert Scales. Apart from the testimony of the accomplice, it was proven that the petitioner's car was the one used, that petitioner had lied about owning the car, and that petitioner had the car painted to change its appearance after the crime. (See opinion of Ct. of Crim. App.; Pet. Cert. at A2-A3). Therefore, the respondent submits that this contention is without merit.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ROBERT E. KENDRICK
Deputy Attorney General

WELDON B. WHITE, JR.
Assistant Attorney General